THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZANGO, INC. , Plaintiff, v. PC TOOLS PTY, LTD., Defendant.	Case No. 07-CV-00797 JCC **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FORUM NON CONVENIENS**

Zango believes PC Tools has contracts with Washington brick-and-mortar retailers and Washington on-line retailers. PC Tools does not. Zango's remaining bases for jurisdiction are that PC Tools has a limited keyword advertising contract with Microsoft (which is the world's largest software company and which has nothing to do with Zango's claims) and that PC Tools has a website on which computer users may buy Spyware Doctor. Personal jurisdiction over PC Tools does not exist, and the case should be dismissed.

I. THE COURT DOES NOT HAVE GENERAL PERSONAL JURISDICTION OVER PC TOOLS.

A. AN INDEPENDENT DISTRIBUTOR – NOT PC TOOLS – SELLS SPYWARE DOCTOR TO OFFICE DEPOT, FRY'S ELECTRONICS, AMAZON.COM AND ZONES.COM.

Contrary to Zango's speculation, an independent distributor – not PC Tools – sells and delivers Spyware Doctor to retail stores in the U.S, as well as through U.S.-based internet sites like www.amazon.com and www.zones.com. PC Tools sells Spyware Doctor to a third-party

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distributor (Encore Software, Inc., based in Los Angeles and owned by a Minnesota corporation), which in turn sells Spyware Doctor to Office Depot and Fry's Electronics, as well as through www.amazon.com and www.zones.com. *See* Second Declaration of Neill Whitehead, ¶¶ 7, 9. Because Encore is an independent contractor, PC Tools does not have the ability to control Encore's decisions as to distribution, and in fact does not exercise control over such decisions. *See* Second Declaration of Neill Whitehead, ¶ 9. While this indirect "contact" with Washington may be relevant – if at all – to a "stream of commerce" theory of specific personal jurisdiction, it is irrelevant to the general personal jurisdiction analysis. *See Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 788 (7th Cir. 2003) ("PRF's reliance on the stream of commerce theory is misplaced because that theory is relevant only to the exercise of specific jurisdiction; it provides no basis for exercising general jurisdiction over a nonresident defendant"); *Fisher v. Professional Compounding Centers of America*, 318 F.Supp.2d 1046, 1050 (D. Nev. 2004) ("the stream of commerce theory does not apply to a general jurisdiction analysis").

B. PC TOOLS' LIMITED CONTRACTUAL RELATIONSHIP WITH MICROSOFT'S MSN.COM DOES NOT JUSTIFY GENERAL PERSONAL JURISDICTION.

PC Tools' limited keyword advertising contract with MSN.com does not support the exercise of general personal jurisdiction. A link to PC Tools' website is provided when a user of MSN.com enters certain search terms (such as "spyware" or "malware") into MSN.com's search engine. *See* Second Declaration of Neill Whitehead, ¶ 3. If the user clicks on the link, the user is then taken to PC Tools' website. *Id.*

Microsoft is the largest software company in the world, and MSN.com "is the world's most popular internet destination." *See* http://www.msn.com/worldwide.aspx. If merely entering into a contract with Microsoft to use MSN.com to advertise internationally via the website subjects an advertiser to general personal jurisdiction in Washington, then every company that has so contracted with Microsoft could be forced into the courts of Washington to

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answer complaints filed by plaintiffs other than Microsoft. Certainly, general personal jurisdiction – with its emphasis on "systematic and continuous" contacts – cannot be found based on such a limited contact. Far more is required. If not, the ripple effect of such precedent would be enormous.

C. PC TOOLS' LIMITED SALES TO WASHINGTON USERS DO NOT SUPPORT THE EXERCISE OF GENERAL PERSONAL JURISDICTION.

Zango contends that general personal jurisdiction should be exercised because of PC Tools' sale of Spyware Doctor to Washington-based customers. Zango is wrong for several reasons. Contrary to Zango's guess, PC Tools does not have any contracts with Washington retailers. *See* Second Declaration of Neill Whitehead, ¶ 7. In addition, all Washington-based customers who have purchased Spyware Doctor have agreed they cannot sue PC Tools in Washington. *Id.*, ¶ 6. Moreover, PC Tools' sales to Washington-based customers are lower than speculated by Zango, *id.*, ¶ 4, and the sales volume does not rise to the level of "systematic and continuous" contacts necessary for general jurisdiction.

1. PC TOOLS' INTERNET SALES TO WASHINGTON-BASED CUSTOMERS ARE INSUFFICIENT.

As explained in PC Tools' motion, the standard for general jurisdiction "is an exacting standard, as it should be, because a finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004). To assert general personal jurisdiction, therefore, courts have required contacts to be "systematic and continuous" such that they "approximate physical presence." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1169 (9th Cir. 2006) (citation omitted) (defendant must have effectively "stepped through the door" and "sat down and made itself at home" in the forum state). Because of the severe implications to a foreign defendant that would result from a finding of general jurisdiction, "courts have been understandably reluctant to exercise general jurisdiction." *Id*. at 1172.

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Courts are even more reluctant to assert general jurisdiction when the only basis is an interactive website that allows the defendant to sell products to customers in the forum state:

> Given that individuals can access an Internet website from any forum, an exercise of general jurisdiction based solely on an interactive website would subject many companies and individuals to suit in essentially any court, *which is untenable*. There must be evidence to show that the website was systematically and continuously aimed at the forum such that an exercise of jurisdiction would comport with "traditional notions of fair play and substantial justice."

Mullally v. Jones, 2007 WL 674294, *5 (D. Nev. 2007) (emphasis added); *see also Molnlycke Health Care AB v. Dumex Med. Surgical Prods. Ltd.*, 64 F.Supp.2d 448, 451 (E.D.Pa.1999) ("the establishment of a website through which customers can order products does not, on its own, suffice to establish general jurisdiction. To hold that the possibility of ordering products from a website establishes general jurisdiction would effectively hold that any corporation with such a website is subject to general jurisdiction in every state. The court is not willing to take such a step.").

And this is good policy. Today's increasingly competitive marketplaces demand convenient, interactive websites. Finding general jurisdiction in cases such as this one would eviscerate long-standing general jurisdiction principles and unreasonably hamper the efficiency and attractiveness of electronic marketplaces. *See GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000) (finding that advanced technologies like the Internet should not vitiate long-held and inviolate principles of federal court jurisdiction because an expansive view of personal jurisdiction would "shred these constitutional assurances out of practical existence"). The rationale for personal jurisdiction declines even further when a defendant's website requires customers to sign a "clickwrap agreement" with forum selection and choice of law clauses specifying that disputes must be adjudicated in a different forum and governed by that forum's law. *See*, *e.g.*, *Instabook Corp. v. Instantpublisher.com*, 469 F.Supp.2d 1120, 1127 (M.D. Fla. 2006).

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Here, PC Tools' clickwrap agreements with U.S. customers require that disputes be resolved in Ireland under Irish law, where PC Tools' sales affiliate covering online sales in the U.S. territory is located. *See* Second Declaration of Neill Whitehead, ¶ 6. When a defendant like PC Tools has taken substantial steps to ensure that it cannot be haled into courts in which some of its customers reside, it would offend traditional notions of fair play and substantial justice to allow a *third-party* to sue the defendant in that state *based on the defendant's contacts with those customers*. As the Supreme Court has emphasized: "the foreseeability that is critical to due process analysis is…that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-74 (1985) (minimum contacts must be "purposeful" contacts in order to "ensure that non-residents have fair warning that a particular activity may subject them to litigation within the forum"). This requirement "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id*. Accordingly, exercising general jurisdiction over a defendant that has organized its affairs so that it cannot be sued by its customers in the home state of its customers is improper because there is no "fair warning," and the defendant does not "reasonably anticipate being haled into court" in that forum. *Id*.

PC Tools has not systematically and continuously aimed its website at Washington. *See Mullally*, 2007 WL 674294, *5. Instead, its website does not focus on any particular geographic region. Moreover, any end user in the United States, including Washington, that purchases or otherwise downloads Spyware Doctor must agree to a license agreement specifying that any disputes must be adjudicated in Ireland under Irish law. (For customers in the Oceanic Region, the choice of law and venue is Australia). *See* Second Declaration of Neill Whitehead, ¶ 6. *See Voicelink Data Servs. v. Datapulse, Inc.*, 86 Wn. App. 613, 617, 937 P.2d 1158, 1160 (1997) (enforcing forum selection clause and stating that "[p]articularly in the commercial context, the

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enforcement of forum selection clauses serves the salutary purpose of enhancing contractual predictability"); *McGill v. Hill*, 31 Wn. App. 542, 547, 644 P.2d 680, 683 (1982) ("An express choice of law clause in a contract will be given effect, as expressing the intent of the parties, so long as application of the chosen law does not violate the fundamental public policy of the forum state"). Zango, a third-party, should not be permitted to sue PC Tools in Washington based solely on PC Tools' internet sales to Washington-based customers, especially when such customers have agreed to venue and choice of law outside of Washington.

Furthermore, the end users who download Spyware Doctor from PC Tools' website decide and direct where the product is delivered. After agreeing to the license agreement and paying the license fee, the end user directs PC Tools' website to send the electronic files to the user's computer. The transaction is analogous to an "FOB" term in which the purchaser, and not the seller, determines where the purchased product will be delivered, further showing how PC Tools has not directed commercial activity at Washington. *See, e.g., DeSantis v. Hafner Creations, Inc.*, 949 F.Supp. 419, 425 n.17 (E.D. Va. 1996) ("Many cases sensibly conclude that the practice of sending shipments FOB is one of many factors to be considered in assessing the propriety of personal jurisdiction"); *Singletary v. B.R.X., Inc.*, 828 F.2d 1135, 1136 (5th Cir. 1987) ("This contact was weakened even further by the fact that the sale was initiated by the buyer and was shipped F.O.B. California, the seller's place of business"). Finally, customers buying Spyware Doctor from PC Tools' website conduct the transaction through a third party processor called Digital River GmbH, which is a German company based in Cologne, Germany. *See* Second Declaration of Neill Whitehead, ¶ 5.

2. PC TOOLS' INTERNET-BASED SALES TO WASHINGTON USERS ARE SMALLER THAN ESTIMATED BY ZANGO.

Zango speculates that PC Tools' sales of Spyware Doctor to Washington-based customers in the last year are somewhere between $1.1 to $2.0 million. Zango's calculation is wrong because it assumes that all downloads of Spyware Doctor are paid downloads.

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A substantial majority of Spyware Doctor downloads are free or trial versions. *See* Second Declaration of Neill Whitehead, ¶ 4. As a result, PC Tools' best estimate is that annual revenue derived from sales and renewals of Spyware Doctor in Washington is approximately $550,000. *Id.* Actual percentages are not readily available, but this volume of sales represents a very, very small percentage of PC Tools' overall annual sales of Spyware Doctor. PC Tools' very low level of business in Washington is not properly characterized as systematic and continuous such that PC Tools has "sat down and made itself at home" in Washington. *Tuazon*, 433 F.3d at 1169; *see, e.g.*, *Costa v. Keppel Singmarine Dockyards PTE, Ltd.*, 2003 WL 24242419, *9 (C.D. Cal. 2003) (defendant entered into five contracts performed in forum state, revenue from which represented 11.75% of defendant's gross receipts; court denied general personal jurisdiction, stating "[w]hile admittedly each of the contracts generated millions of dollars in revenue for KSD, and together they appear to represent a not [in]significant percentage of KSD's business, this alone is not sufficient to support a finding of general jurisdiction.").

II. THE COURT DOES NOT HAVE SPECIFIC PERSONAL JURISDICTION OVER PC TOOLS.

A. BECAUSE IT DID NOT EXPRESSLY AIM ANY ACTS AT WASHINGTON, PC TOOLS HAS NOT PURPOSEFULLY AVAILED ITSELF OF WASHINGTON'S PRIVILEGES.

Because Zango has alleged intentional torts, it does not dispute that the "effects" test applies to the purposeful availment requirement. *See Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). To satisfy this test Zango must establish that PC Tools (1) committed an intentional act, (2) expressly aimed at Washington, (3) causing a jurisdictionally sufficient amount of harm to Zango in Washington. *Id.* *See also Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme,* 433 F.3d 1199, 1207 (9th Cir. 2006)

In its response, Zango asserts that the "intentional act" in this case is PC Tools' sales of software to Washington residents. Opposition, Dkt. No. 34, at 13, lines 19-21. But this stands in stark contrast to Zango's Complaint in this case, in which it challenges the classification decisions made by PC Tools' Malware Research Centre in Australia. *See* Complaint, Dkt. No. 1,

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¶¶ 10-13. To the extent PC Tools committed an intentional act in this case, it is that PC Tools made classification decisions in Australia, without aiming such decisions at any particular forum. *See* Declaration of Neill Whitehead, Docket No. 18, ¶ 2.

Moreover, as shown above, PC Tools has not expressly aimed its sales efforts at Washington. PC Tools' website is generally available on the worldwide web, and is not limited or targeted to Washington residents. PC Tools has not (1) conducted advertising (print, radio, TV, or online) directed or circulated to only Washington residents or a small number of states including Washington, (2) conducted promotions directed only to Washington residents or a small number of states including Washington; or (3) sponsored events in Washington or a small number of states including Washington. *Id.*, ¶ 5.

Because the effects test shows that PC Tools has not purposefully availed itself of the privileges of doing business in Washington, specific jurisdiction is inappropriate.

B. BECAUSE MANY OTHER FACTORS HAVE CONTRIBUTED TO ZANGO'S ALLEGED HARM, ZANGO'S CLAIMS DO NOT ARISE OUT OF OR RELATE TO PC TOOLS' WASHINGTON CONTACTS.

Zango argues that "but for [PC Tools'] utilization of its website to pass its product into Washington, [Zango] would not have allegedly suffered harm in Washington." Opposition, Dkt. No. 34, at 14, lines 7-9. This stands in direct contradiction to the gravamen of Zango's Complaint – that PC Tools' Malware Research Centre in Australia has improperly classified Zango's software. *See* Complaint, Dkt. No. 1, ¶¶ 10-13. That is the alleged act that, if proven, forms the "but for" cause of Zango's harm. Simply put, Zango does not challenge the distribution of PC Tools' product into Washington by website or otherwise, and does not limit or even focus its claims to Washington; Zango challenges the classification decisions made by PC Tools in Australia and incorporated into PC Tools' Spyware Doctor product no matter where it is distributed.

Further, Zango admits that other anti-spyware programs have contributed to its alleged damage. *See* Opposition, Dkt. No. 34, at 2-3, lines 24-3 ("Zango has lost more than 143,000

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U.S. customers in just that past few months, which Zango attributes solely to the wrongful conduct of PC Tools and other anti-spyware providers."); 5, lines 29-31 ("Zango believes that PC Tools' Spyware Doctor, and a few other anti-spyware programs, have wrongfully damaged Zango's customer base") (emphasis added). Indeed, this Court is aware that Zango has a separate lawsuit against Kaspersky, another anti-malware company. PC Tools also submitted evidence showing that at least 8-10 other anti-malware companies detect Zango software and assign labels similar to the label assigned by PC Tools. *See* Declaration of John Sarapuk, Dkt. No. 22, Exhibit 4. In addition, Zango continues to stick its head in the sand when forced to see that its very recent public settlement with the FTC – including a $3 million fine and strict controls over its ability to solicit "customers" – no doubt would have a negative effect on Zango's reputation, popularity, and revenue. Finally, Spyware Doctor holds less than a 5% share of the worldwide anti-spyware market. *See* Second Declaration of Neill Whitehead, ¶ 9.

Zango cannot establish that "but for" PC Tools' Washington contacts Zango would not have suffered a jurisdictionally sufficient amount of its alleged damage in Washington.

C. EXERCISING SPECIFIC PERSONAL JURISDICTION WOULD BE UNREASONABLE.

In addition to the lack of any significant or quality forum contacts by PC Tools (addressed above), the competing interests of Australia and Washington, and efficient judicial resolution, prove the exercise of jurisdiction to be unreasonable in this case. As to the competing interests, Australia has a more important interest in adjudicating a dispute involving one of its significant corporate citizens than Washington has in protecting a notable purveyor of malware. *See Pac. Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1330 (9th Cir. 1985) ("when the nonresident defendant is from a foreign nation…the sovereignty barrier is higher, undermining the reasonableness of personal jurisdiction"). Similarly, because all of the witnesses and documents concerning PC Tools' classification decisions reside in Australia, an efficient judicial resolution of the controversy weighs decidedly in favor of Australia. *See* Declaration of Neill Whitehead, Docket No. 18, ¶¶ 2-3. For these reasons, and because Zango does not dispute that

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analogous legal claims exist under Australian law, it would be unreasonable for the Court to exercise jurisdiction in this case.

III. FORUM NON CONVENIENS

Because Australia provides an adequate alternative forum, Zango opposes PC Tools' *forum non conveniens* argument solely on the (erroneous) ground that private and public factors do not favor dismissal. Zango discusses only three of the seven private factors, and two of the five public factors, relevant to *forum non conveniens* determinations. Zango's argument errs in analyzing the few factors it discusses.

A. PRIVATE FACTORS

Zango argues that private factors favor a Washington forum because this case is primarily about the effect of PC Tools' anti-spyware program on Zango's relationships with computer users. However, it is only necessary to measure those effects – which are, in essence, damages – if Zango first establishes that PC Tools should be held liable for its conduct. That larger, more complex determination of liability hinges on actions taken in Australia. It was in Australia that PC Tools determined that it should detect and alert its customers that Zango's software was on their computers. Moreover, Zango does not appear to care where Spyware Doctor was distributed, whether in Washington or elsewhere.

Zango also contends it is more convenient for PC Tools to litigate in Washington than it would be for Zango to litigate in Australia. However, "neither the Supreme Court nor [the Ninth Circuit] has given much weight to inconvenience to the plaintiff" in evaluating the acceptability of a foreign forum. *Core-Vent Corp. v. Nobel Indus.*, 11 F.3d 1482, 1490 (9th Cir. 1993). If PC Tools were forced to litigate in the "home" forum of every program distributor unhappy with PC Tools' classifications, PC Tools could be haled into court in every state and every country where the thousands of distributors of malware are based. PC Tools' executives and analysts would face the considerable inconvenience and expense of spending days traveling to and from

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Australia for each such case. By contrast, there are far fewer anti-malware companies like PC Tools. It is much easier for Zango and other malware distributors to litigate in the handful of jurisdictions where anti-malware companies are based than it would be for the anti-malware companies to litigate in the many jurisdictions in which the malware distributors are based.

B. Public Factors

Zango attempts to portray itself as a model Washington corporation with valuable software that the state has an interest in protecting. Zango obliquely references its "problems in the past," and then stubbornly attributes those problems to the actions of "third-party business affiliates." However, it was Zango – not its third-party affiliates – that agreed to pay a $3 million fine and agreed to change its practices as part of a settlement with the FTC. And it is Zango – not its affiliates – that still is being monitored by the FTC. (Dkt. No. 28, 3:12-4:3) (quoting FTC press release). Further, by its own admission, only 1.6% of Zango's U.S. customers are Washington residents. Based on Zango's assertion that it has at least 20 million customers worldwide, http://www.zango.com/Destination/Corporate/About.aspx, Zango's Washington-based customers represent at most 0.27% of Zango's overall customers. Washington's interest in protecting Zango is slight.

IV. The Court Need Not Address Venue.

Because the Court cannot exercise personal jurisdiction over PC Tools, Zango's contention that 28 U.S.C. § 1391(d) supports venue is irrelevant. Even if the Court were to find that personal jurisdiction and venue are proper, the Court can and should dismiss the case on *forum non conveniens* grounds.

V. Jurisdictional Discovery Is Unnecessary.

A district court has broad discretion to deny requests for jurisdictional discovery, and its decision "will not be reversed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (quotations omitted).

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There is no need for jurisdictional discovery in this case. Zango's claim of personal jurisdiction is both attenuated and based on erroneous beliefs. PC Tools has presented detailed affidavits correcting Zango's speculation concerning the jurisdictional facts. The record is sufficient for the Court to rule on PC Tools' motion to dismiss. *See Loral Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 562 (9th Cir. 1995) ("Where a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the Court need not permit even limited discovery" (quotations omitted)).

Dated June 22, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

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DATED: June 22, 2007 at Denver, Colorado.

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